IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

TUESDAY, THE 3RD JULY 2007 / 12TH ASHADHA 1929

WP(C).No. 10869 of 2006(R)

EA.1544, 1545 & 1546/03 IN EP.246/03 IN OS.545/2002
of II ADDL.SUB COURT, THRISSUR

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PETITIONER:

C.L.CLEETUS, S/O.LONAPPAN,
CHUNGATH PARAKKAT HOUSE, PERAKAM,
CHAVAKKAD TALUK, THRISSUR DISTRICT,
(PERSON OF UNSOUND MIND), REP. BY NEXT FRIEND
THOMA, S/O.THOMAS, OVUNGAL HOUSE, KANIMANGALAM,
THRISSUR DISTRICT.

BY ADV. SRI.T.KRISHNAN UNNI

RESPONDENTS:

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1. THE SOUTH INDIAN BANK LTD.,
CHAVAKKAD BRANCH,
REP. BY ITS BRANCH MANAGER,
CHAVAKKAD, THRISSUR DISTRICT.

2. LISSY CLEETUS,
CHUNGATH PARAKKAT HOUSE,
PERAKAM, CHAVAKKAD TALUK,
THRISSUR DISTRICT.

R1 BY ADV. SRI.K.PRABHAKARAN, SC,SOUTH INDIAN BANK

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 03/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WPC.10869/06

APPENDIX

PETITIONER'S EXTS:

EXT.P1 – TRUE COPY OF ORDER PASSED BY SUB COURT, THRISSUR IN EA.1544 AND 1545/03 IN EP.246/03 IN O.S.545/02 DT.29.11.05

EXT.P2 – TRUE COPY OF ORDER PASSED BY SUB COURT, THRISSUR IN E.A.1546/03 IN EP.246/03 IN O.S.545/02 DT.29.11.05.

/TRUE COPY/

PIUS C. KURIAKOSE, J.

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W.P.(C)No.10869 OF 2006

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DATED THIS THE 3RD JULY, 2007

J U D G M E N T

The 1st judgment-debtor in a decree obtained by the 1st respondent, the South Indian Bank impugns in this Writ Petition filed under Article 227, Exts.P1 and P2 orders passed by the execution court. Ext.P1 is the common order passed on execution applications for setting aside ex parte order and for condonation of delay. Ext.P2 is the order passed on an execution application filed by the signatory to this Writ Petition seeking his impleadment as the next friend of the 1st judgment-debtor.

2. I have heard the submissions of Mr.T.Krishnanunni, learned counsel for the petitioner and also those of Sri.K. Prabhakaran, learned Standing Counsel for the 1st respondent Bank.

3. Sri.T.Krishnanunni would flay both Ext.P1 and Ext.P2. As regards Ext.P1, the learned counsel would submit that the learned Subordinate Judge was not justified in dismissing the applications filed by the petitioner on the ground of delay. There really was no delay and the condonation application was filed only by way of abundant

caution. According to the learned counsel, ex parte orders contemplated under Rule 105(3) of Order XXI CPC are orders finally disposing of the execution petition and not orders setting the judgment debtor ex parte at some earlier stage of the execution proceeding. Period of limitation prescribed by Rule 106(3) of Order XXI applies only in respect of ex parte orders finally disposing of the execution proceeding. Learned counsel drew a parallel between applications filed on the original side under Order IX Rule 13 CPC and those filed under Order IX Rule 7. Counsel submitted that the period of limitation applies only in respect of applications filed under Order IX Rule 13 and not in respect of applications filed under Order IX Rule 7. Counsel would further submit that at any rate the petitioner should be permitted to participate in the further proceedings in the Execution Petition.

4. As regards Ext.P2, Mr.Krishnanunni would rely on the judgments of this Court in **Balakrishnan v. Kalliyani** [AIR 1957 Kerala 51] and in **Syed Hassan Baffakki Thangal & others v. Kalliath Thazha Chirutha & others** [AIR 1988 Kerala 160] and submit that it was obligatory under Order XXXII Rule 15 CPC that the court conducted an enquiry as to whether the petitioner had become

incapable due to any mental infirmity of protecting his interest in the litigation.

5. Sri.K.Prabhakaran, Standing Counsel for the decree-holder-Bank, resisting the submissions of Mr.Krishnanunni would submit that having filed an application for condonation of delay, it is futile for the petitioner to contend that there was no delay. The position of law is trite that Section 5 of the Limitation Act does not apply to execution applications and therefore Ext.P1 order is perfectly in order. As regards Ext.P2, the learned Standing Counsel would support Ext.P2 on the various reasons stated in Ext.P2 itself. No material has been placed before the court below to prove that the petitioner has any mental ailment or that he is undergoing treatment for several years. The present move is a collusive affair between the petitioner and the 2nd judgment-debtor, the petitioner's own wife to protract the execution proceedings to the maximum extent possible so that the decree-holder Bank can be prevented from securing the fruits of the decree.

6. It is difficult to accept Mr.Krishnanunni's arguments in respect of Ext.P1 order. It is true that there is distinction between applications which are filed under Order IX Rule 13 and those filed under Order IX

Rule 7, in that while the former seeks cancellation of decrees finally disposing of suits, the latter seeks cancellation of only orders setting the applicant ex parte, thus preventing him from participating in further proceedings in the suit. It is also true that unlike applications under Order IX Rule 13, there is no article in the Limitation Act providing any specific period of limitation for applications under Order IX Rule 7. But Mr.Krishnanunni's argument that since no time limit is specifically provided in the Limitation Act for filing applications under Order IX Rule 7, such applications can be filed at any time cannot be accepted. Such applications, in my opinion, will be governed by Article 137, the residuary article which prescribes a period of three years. Mr.Krishnanunni's argument was that sub-rule (3) of Rule 105 of Order XXI deals only with orders finally disposing of execution petitions and not orders passed at various earlier stages of the execution proceedings. According to the learned counsel, the word "application" used in Rule 105 refers only to execution petitions and not to execution applications. The above argument is to be repelled straightaway since sub-rule (1) of Rule 105 speaks clearly of applications "under any of the foregoing rules", i.e., Rule 1 to Rule 104 of Order XXI. The Civil Rules of Practice which regulates the procedure

and practice of subordinate civil courts in the State gives an inclusive definition for the word "application" which takes in execution petitions, execution applications, cheque applications and interlocutory applications, whether oral or written. Rule 105 deals with the hearing of applications which can either be the main execution petition or an execution application. The Rule says that if the opposite party who has been issued with notice fails to appear, the court shall hear the application ex parte and proceed to pass any order deemed fit. These orders, according to me, can be orders finally disposing of the execution petition or orders deciding any specific issue, say, regarding the executability of the decree which is often decided on the basis of objections filed by judgment-debtors in response to notice under Rule 22 or the liability for arrest often decided pursuant to notice under rule 37 or even settlement of draft proclamation decided in response to notice under Rule 66. Rule 106(1) of Order XXI contemplates cancellation of all types of ex parte orders passed under Rule 105(3) and orders for default passed under Rule 105(2). It follows therefore that the period of limitation prescribed by sub-rule (3) of Rule 106 applies to applications submitted by petitioner for setting aside ex parte orders passed against him at any given stage of the proceedings.

The position could have been different under the old Rule 105 which had sub-rule (4) also in it. But in view of the existing rule position, the execution court has no power to condone the delay caused in the matter of filing applications under Order XXI Rule 106(3). Ext.P1 therefore does not suffer from any infirmity and is only to be approved.

7. However, Mr.Krishnanunni's further argument that at any rate the order setting the 1st judgment-debtor ex parte cannot preclude him from participating in further proceedings in the execution petition on matters not concluded by the ex parte order can be accepted. It is clear from sub-rule (3) of Rule 105 itself that the consequence of the failure of a party to appear before the court at the time of hearing of an application is that the application concerned will be heard and decided ex parte. Whether a judgment-debtor who has thus been set ex parte should be allowed to participate in the further proceedings in the execution petition will depend on the nature of the application or the matter regarding which the notice was given to him. For eg., if the notice received by the judgment-debtor at the hearing of which he remained ex parte was one under rule 22 regarding the executability of the decree, an ex parte order passed against him in

the matter of that notice will not preclude him from participating in further proceedings in the execution petition where the decree is sought to be executed by various modes such as arrest, attachment, sale, delivery etc. The said order will preclude him only from raising contest regarding executability. In the instant case, I am told that the notice at the hearing of which the petitioner was set ex parte was one regarding settlement of a draft proclamation for sale and the ex parte order will not preclude him from raising contentions which are legally available to any other judgment-debtor at the time of sale, notwithstanding settlement of proclamation.

8. The challenge against Ext.P2 stands on a different footing. As already stated, the application submitted by the signatory to the Writ Petition was one seeking his impleadment as the next friend of the 1st judgment-debtor on the reason that the 1st judgment-debtor has become incapable of protecting his interest by reason of mental infirmity. Though the prayer in the application was couched in that manner, the application should have been construed as one for appointment of guardian for the 1st judgment-debtor, since appointment of next friend is contemplated when plaintiffs or decree-holders file suits or execution petitions and not when defendants or

judgment-debtors defend suits or execution petitions filed against them. In fact, courts do not ordinarily appoint next friends. Courts only grant permission to persons to sue on behalf of minors and persons having mental infirmity as their next friends.

9. It is seen from Ext.P2 that a contention was raised that the application is not maintainable since security has not been furnished by the next friend under Order XXXII Rule 2A and that contention has apparently found favour with the court. It should have been noticed that Order XXXII Rule 2A does not have any application in this case where somebody seeks permission on behalf of a person allegedly under mental infirmity. Even though under Rule 15 of Order XXXII all the earlier rules in that Order relating to minors have been made applicable to persons of unsound mind also, Rule 2A which deals with furnishing of security for costs is expressly excluded. Even otherwise, the question of furnishing security by the next friend will arise only after permission is given by the court to the next friend for instituting a given proceeding on behalf of the concerned minor and not earlier.

10. Three other reasons which weighed with the learned Subordinate Judge for dismissing the application and passing Ext.P2

were that no medical evidence has been produced to show that the 1st judgment-debtor is suffering from any mental ailment and that the 2nd judgment-debtor, his wife has not chosen to file a like petition and that the signatory to the present Writ Petition who is a stranger has no locus standi to file the application. These reasons should not have deterred the court from following the mandates of Rule 15. Rule 15 of Order XXXII contemplates an enquiry by the court also in respect of persons who are alleged to be incapable of protecting their interest on account of any mental infirmity. When the court is informed by affidavit or otherwise that a person has become insane or incapable by reason of mental infirmity and therefore is unable to protect his interest himself, it is obligatory that the court conducts a judicial enquiry with notice to the person concerned or any other person competent to represent on his behalf. In this case, no enquiry has been conducted by the court and the court has ignored the information furnished to the court through the affidavit in support of the present application at the threshold. The legal position in that regard is trite and is covered by various pronouncements including those cited at the Bar by Mr.Krishnanunni, such as **Balakrishnan v. Kalliyani** (AIR 1957 Kerala 51) and **Syed Hassan Baffakki Thangal & others v.**

Kalliath Thazha Chirutha & others (AIR 1988 Kerala 160). The ideal course would have been to direct the appearance of the 1st judgment-debtor allegedly under mental infirmity and the court conducts a voir dire by putting questions to him so as to verify whether there is any substance in the information furnished to the court by the self-styled next friend. The court also could have directed production of documentary evidence regarding the alleged mental illness of the 1st judgment-debtor, as yet another priliminary step in the enquiry under Rule 15 of Order XXXII. Without holding at least an initial enquiry as suggested above, the court should not have concluded that the 1st judgment-debtor is capable of protecting his interest in the litigation. If the initial enquiry reveals that there is no truth at all in the information conveyed to the court regarding the mental health or capacity of the petitioner, the court can very well dismiss the application. But if in that enquiry it is revealed that there is warrant for further enquiry, the court can hold such further enquiry deemed fit, i.e., by referring the alleged insane/infirm person to a medical board etc., before coming to final conclusions and granting the permission sought for.

11. Ext.P2 in as much as the same is not preceded by any

enquiry is liable to be set aside. The same is set aside. The learned Subordinate Judge is directed to take fresh decision on the application in the light of the observations made hereinbefore.

The Writ Petition is allowed as above. No costs.

(PIUS C.KURIAKOSE, JUDGE)

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In this Writ Petition under Article 227 of the Constitution, the petitioner who was the 1st judgment-debtor impugns Exts.P1 and P2 orders. Ext.P1 order is passed on an application for condonation of delay filed under Section 5. Among other reasons, the execution court has observed that Section 5 of the Limitation Act does not apply to execution applications. I do not find any infirmity about the view taken by the execution court. Ext.P2 is an order passed by the execution court on a petition filed by a third party on behalf of the 1st judgment-debtor seeking his impleadment as the next friend of the 1st judgment-debtor. In Ext.P2, the learned Sub Judge has noticed two things:- 1) an identical application was filed on the original side which was dismissed. That order has attained finality; 2) the 2nd judgment-debtor who is the wife of the present petitioner does not endorse the stand in the present petition that the petitioner is mentally insane. I do not find any infirmity about Ext.P2 also. The challenge against Exts.P1 and P2 fails and the Writ Petition is dismissed.

(PIUS C.KURIAKOSE, JUDGE)

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